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No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761 INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA AND INTERNATIONAL CHEMICAL WORKERS UNION, *Amici Curiae*

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INTRODUCTORY STATEMENT

The interest of the United Steelworkers of America and the International Chemical Workers Union in this case can be simply stated. Each has pending, in one of the courts of appeals, a case involving facts substantially identical to those involved here. *United Steelworkers of America (Phelps Dodge Refining Corp.)*, 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (Mar. 31, 1960) *now pending on review in the 2d Circuit*, No. 26252; *Local 36, Int'l Chemical Workers (Virginia-Carolina Chemical Corp.)* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960,), *now pending on review in the D.C. Circuit*, No. 15631. There is only one significant difference between those cases and the present case. In the present case, the contractors' gate had existed for some time. In the *Phelps Dodge* case, the special gate

for contractors was established shortly before the strike, and in anticipation of it. And in the *Virginia-Carolina* case, the fence and the special gate were constructed only after the strike began.

The present decision was the basis for the Board's ruling in each of those cases. Thus, if we are correct in our view that the present decision is erroneous, it would follow that the Board's decisions in those cases are also erroneous.

The interest of the *amici,* however, goes far beyond their interest in two pending cases. Those cases are only a taste of what will happen to the right to strike and to picket if the present decision is sustained. They illustrate the ease with which an employer can avoid the normal effect of a picket line, under the rule promulgated in the present case, by establishing a separate gate for employees of other employers. Unless the Board is reversed here and now, the right of a union to induce employees of other employers to stay away from struck premises will be virtually eliminated.

It will be our purpose, in this brief, to show that Congress did not intend, when it enacted Section 8(b)(4)(A) of the Taft-Hartley Act, to interfere with the right of a union to picket an employer with whom it has a legitimate dispute in an effort to keep all third persons away from the employer's premises. We will demonstrate that, prior to the present decision and others which have followed it, the Board and the courts had uniformly recognized that such picketing was one of the types of concerted action protected by Sections 7 and 13 of the Act. Finally, we will show that the Board's cease and desist order in the present case could not be enforced even if the Board's interpretation of the original statute were correct, since the recent amendments to the Act, which were passed shortly after the Board's decision in this case, make clear that the kind of conduct which the union engaged in here is not an unfair labor practice.

SUMMARY OF ARGUMENT

I—The legislative history of Section 8(b)(4), as well as the Board and court decisions interpreting it, make clear that that provision, despite its broad language, was intended only to prohibit "secondary" boycotts and "secondary" picketing, but was not designed to restrict the normal economic weapons that unions traditionally use at the site of a labor dispute. Thus, it has been consistently held that it is not a violation of Section 8(b)(4) for a union to picket the employer with whom it has a legitimate "primary" dispute, even though such picketing invariably has as one of its objects inducing employees of other employers not to cross the picket line. Similarly, the cases hold that a union may use speeches, telephone calls, letters, internal union discipline, or any other means to induce other employees to stay away from the primary employer's premises. Such appeals have never been held to violate the statute so long as the employees of other employers are not asked to engage in work stoppages at any place other than the site of the primary dispute.

This Court has itself upheld the right of a union to ask employees of other employers not to cross a primary picket line in *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 (1951). While that opinion was not written precisely in terms of the distinction between primary and secondary activities, it has always been considered by the Board and the lower federal courts to have approved that distinction.

There is no basis, either in law or in logic, for distinguishing the present case from any other situation involving picketing at the premises of a primary employer in support of a primary strike.

II—Neither the Board nor the court below made clear the basis on which they considered this case to be different from any other case of primary picketing. It is necessary, there-

fore, to examine each of two alternative rationales the Board may now rely upon in an effort to justify the result reached here.

When the present case was first decided, it was generally assumed that the fact which distinguished this case in the minds of the Board and the court was the presence of a reserved gate for employees of other employers. This is, of course, a totally nonsensical distinction. Either it is or it is not unlawful to induce employees of other employers to refrain from working at struck premises; what possible difference can a separate gate make?

The effect of a rule prohibiting picketing at an entrance reserved for employees of other employers would be in many cases to make it virtually impossible for a union to run an effective primary strike, since an employer could continue to ship accumulated inventories through a reserved gate, or could use the strike period to do major repair or reconstruction work by bringing in outside employees through such a gate.

In addition, a rule which would prohibit picketing of struck premises at any gate would present great constitutional difficulties. To the extent that Section 8(b)(4) prohibits peaceful persuasion, this Court has held it to be constitutional because it prohibits inducing or encouraging unlawful action. But the statute expressly protects the right of an employee to refuse "to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act . . ." Thus, to prohibit any picketing of struck premises is to prohibit free speech which is designed to persuade employees to exercise a right given them by law. If the statute could possibly be construed in this way, it would plainly be unconstitutional.

There is some suggestion in subsequent Board decisions that the Board now relies on the so-called "common situs" doctrine, rather than the presence of the separate gate *per se*, as the basis for the present decision. While neither the Board's opinion nor the opinion of the court below appeared to rely on this theory, counsel for the Board may now attempt to justify the decisions on this ground.

The common situs rules are totally inapplicable here. They were developed to govern picketing in the situation where the primary employer's business is located on the premises of another employer, or where two or more employers share a common premises which is not in any meaningful sense the premises of any one of them. In those situations, a union which pickets the "common situs" might often cause a shutdown of all the operations of the other employers at the same site, even though the only relationship between those operations and the primary employer is that they happen to be physically adjacent. An employer not involved in any way in the dispute, and not performing any services for the primary employer, would thus be shut down. Since this is precisely what the statute was intended to prevent, the Board has established certain limitations governing picketing at a common situs. The purpose of these rules is to limit the impact of such picketing in such a way as to make it substantially equivalent to primary picketing at a single employer's premises.

The very case which established the common situs rules reaffirmed the principal that primary picketing at the premises of a single primary employer is lawful even though it induces employees of other employers not to cross the picket line. *Sailor's Union (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950). That case made it perfectly clear that the purpose of the common situs rules was not to limit all picketing appeals to primary employees, but rather to limit common situs picketing in such a way that work stop-

pages by secondary employees would not be more widespread than would occur in the normal primary picketing situation. Thus there is no basis for applying the common situs rules to the present case, which involves none of the special factors which are present in those cases.

III—The present case arose prior to the recent amendments to Section 8(b)(4), and is governed by the original statute. However, the amended version is relevant in two ways. First, it helps to clarify the meaning of the original version. Secondly, if this Court should accept the Board's interpretation of the old statute, it must nevertheless refuse to enforce the Board's order, which operates prospectively, unless it determines that the union's conduct would also be an unfair labor practice under the amended statute.

The amendments added to Section 8(b)(4)(A) contain a specific proviso protecting "any primary strike or picketing." The legislative history of this proviso makes it quite clear that it was designed to protect the right of a union to picket at the premises of a primary employer and to induce employees of other employers not to work at those premises. It also makes clear that Congress included specific language dealing with this matter not because it thought that such picketing was previously prohibited, but because it feared that other changes in language which had been made in Section 8(b)(4) might cast doubt on the legitimacy of traditional primary picketing. Thus the new statute, read in the light of its legislative history, confirms our interpretation of the original Act.

The new statute makes clear that, regardless of the correctness of the Board's present decision under the original terms of Section 8(b)(4), the union's conduct would not violate that statute in its current form. Thus, under familiar principles of equity, the Board's cease and desist order cannot now be enforced.

ARGUMENT

I. SECTION 8(b)(4) DOES NOT PROHIBIT PICKETING OR OTHER ACTION DESIGNED TO INDUCE EMPLOYEES OF OTHER EMPLOYERS TO REFUSE TO WORK AT PREMISES WHERE EMPLOYEES OF A PRIMARY EMPLOYER ARE ENGAGED IN A LAWFUL PRIMARY STRIKE.

This case arose under Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. §158(b)(4)(A) (1958), as it stood prior to its recent amendments. Although, as we will show below, the amendments are relevant to this case, we will first discuss the law as it existed when this case arose.

The pertinent portion of the original statute provides that it is an unfair labor practice for a labor organization

> "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods . . . or perform any services, where an object thereof is: (A) forcing or requiring any . . . person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

This has been one of the most troublesome provisions of a very troublesome act. If read strictly and literally, it would prohibit almost all strikes and picketing, since the object of every strike is to prevent the struck employer from doing business "with any other person" until the employer complies with the striking union's demands. This is not, however, what the statute was designed to prevent. Indeed, Sections 7 and 13 of the National Labor Relations Act protect in very broad language the right to strike and to engage in other concerted activities. 29 U.S.C. §§157, 163. Section 8(b)(4)(A) had a relatively narrow purpose,

which Senator Taft, the chief architect of the legislation, expressed as follows:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 Cong. Rec. 4201 (April 29, 1947).

Thus, as this Court has pointed out,

> "While § 8(b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes, or boycotts, that section is often referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.' The other is § 303, 61 Stat. 141, 29 U.S.C. (Supp. III) § 187, which uses the same language in defining the basis for private actions for damages caused by these proscribed activities." *NLRB* v. *Denver Bldg. Trades Council,* 341 NLRB 675, 686 (1951).

In short, this Section was not intended to affect primary strikes, but only "to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, United Bh'd of Carpenters* v. *NLRB,* 357 U. S. 93 (1958).

While it was never disputed that Section 8(b) (4) (A) did not interfere with the right to strike against an employer with whom a union had a primary dispute, a question was raised very early in the history of the statute as to whether picketing at the premises of such a primary employer was in any way to be restricted. It was argued that since "an object" of such picketing was to turn away employees of secondary employers who, in the course of their employment, would have occasion to come to the primary employer's premises, such picketing might be unlawful.

Nowhere in the legislative history is there any suggestion that Congress intended to restrict the universal practice of striking unions to picket the employer against whom they are striking, in an effort to keep all persons — employees, consumers, and employees of other employers — from entering the struck premises. Indeed, a proviso at the end of Section 8(b)(4) specifically states that "nothing contained in section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act." Thus the section read as a whole, particularly in the light of the legislative history, would seem to permit a striking union to induce employees of other employers to respect a picket line at the premises of a primary employer.

The leading decision of the Board dealing with this problem is *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949). There a union was on strike against Standard Oil Company at a dock which was owned by Standard but which was used by both Pure Oil Company and Standard for shipment of oil. Tankers, owned by separate employers, loaded oil shipped by both Standard and Pure at that dock. In support of its strike against Standard, the union

picketed the dock, and as a result the employees of Pure refused to work at those premises. The union also wrote a letter to the employees of Great Lakes, an operator of one of the tankers which normally stopped at the dock, informing those employees that Pure Oil products at the dock, unless loaded by Standard supervisors, were to be considered "hot."

The complaint alleged that the union violated the act "by advocating strike action by employees of both Pure Oil and Great Lakes, in order to force Pure Oil to cease doing business with Standard Oil, and to force Great Lakes to cease doing business with Pure Oil." 84 N.L.R.B. at 317. The Board concluded, however, that the union's conduct was "*primary* action in support of its strike against Standard Oil" and involved only the "traditional means of conveying to fellow workers and to the public at large the fact that a labor dispute exists with Standard Oil." *Id.* at 317-318 (Emphasis in original.)

The Board conceded that the "picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer," but held that that fact did not make the picketing unlawful under 8(b)(4). The Board pointed out that the purpose of the statute, as evidenced by its legislative history, was to prohibit secondary boycotts, but not to interfere with traditional primary activities. Accordingly, the Board concluded "that the section does not outlaw any of the primary means which unions traditionally use to press their demands on employers." The picket line at the employer's premises and the letter to the employees of Great Lakes both fell into that category, said the Board, since they both "amounted to nothing more than a request to respect a primary picket line *at the Employer's premises.*" 84 N.L.R.B. at 319 (emphasis in original).

It is significant that the lone dissenter in the *Pure Oil* case, Board Member Gray, did not disagree with the gen-

eral principles on which the majority's opinion was based. He disagreed only as to the import of the union's letter to the Great Lakes employees. In his view, it induced and encouraged those employees to boycott the "hot" oil at places *other* than the struck premises. He concluded, therefore, that the union's conduct was unlawful to the extent that it "sought to extend its activity to a front outside the area of the immediate dispute."

The principle that a union does not violate 8(b)(4) when, by picketing or otherwise, it induces employees of other employers to refuse to enter the premises of a primary employer where the union is engaged in a legitimate primary dispute, was reaffirmed in *Newspaper Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950). There a union was engaged in a primary strike at the New York subway newsstands. In support of this strike the union not only placed pickets at some subway entrances, but also "visited employees of other employers who normally deliver newspapers to Interborough's newsstands, and induced and encouraged these employees, who are also members of the Respondent, not to make deliveries to the struck employer's subway newsstands." 90 N.L.R.B. at 2135. Relying on the *Pure Oil* decision, the Board held that the union had not violated 8(b)(4) by this course of conduct, since the union's "inducement invited action only at the premises of the primary employer, whose employees were on strike. . . . " Id. at 2135.

The issue was presented to this Court in *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951). In that case, a union picketed an employer in order to obtain recognition as the bargaining representative of that employer's employees. "In the course of their picketing, the agents sought to influence . . . two men in charge of a truck to refuse, in the course of their employment, to go to the mill for an order of goods." 341 U.S. at 667. The Board, following its *Pure Oil* decision, held that this was a primary

activity not prohibited by Section 8(b)(4)(A). 84 N.L.R.B. 360. The Fifth Circuit reversed, holding that "these activities became secondary when the strikers attempted to induce and encourage the employees of this neutral employer Sales House. The fact that they occurred near the struck employer's plant is not enough to draw such a distinction as the Board attempts to draw . . ." 183 F. 2d 21, 26.

This Court upheld the Board and reversed the Fifth Circuit, holding that

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here." 341 U.S. at 671.

As the above excerpt indicates, the Court did not put its opinion in terms of the distinction between primary and secondary activities as the Board had done. Nevertheless, the *Rice Milling* opinion is generally deemed to have approved the rule that a union may induce employees of other employers not to enter the premises of the primary employer.

The Court's opinion stressed the fact that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike . . ." 341 U.S. at 672. Citing section 13 of the act, 29 U.S.C. § 163, the Court stated that

> "parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act. No such specific provision

in § 8(b)(4) reaches the incident here. The material legislative history supports this view."

These portions of the opinion demonstrate the Court's awareness of the fact that the kind of conduct which the union had engaged in was protected as part of the right to strike, and for that reason alone could not be considered unlawful under § 8(b)(4)(A). Thus, while in the particular case only "two employees in charge of a truck" were induced to stay away from the picketed premises, the opinion, read as a whole, indicates that the Court would have reached the same result in any case involving picketing of the kind which traditionally accompanies a primary strike.

There is, indeed, a very strong indication in *Rice Milling* that the Court would have considered its decision controlling in the present circumstances. The Court cited, in support of the proposition that Congress intended to safeguard the right to strike, *United Electrical & Machine Workers (Ryan Constr. Co.)* 85 N.L.R.B. 417, 418 (1949). In that case, as in the present one, a union on strike against an employer picketed a gate to the employer's premises which was used only by employees of an independent construction contractor, who was engaged in a construction project on the premises. The Board concluded that the picketing was lawful, in a decision which it has recently overruled because of its conflict with the present case. See *Local No. 36, Int'l Chemical Workers,* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960). The critical portion of the Board's opinion in the *Ryan* case appears on the page which the Court cited with approval in *Rice Milling:*

> "As the record reveals and the Trial Examiner finds, the Respondents, in support of their demands on Bucyrus, proceeded to picket the entire Bucyrus premises, including the gate that had been cut through the fence to provide ingress for Ryan employees to the site of

a construction project Ryan was performing for Bucyrus. All this picketing was therefore primary picketing. Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer.[2] When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus,* did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate." 85 N.L.R.B. at 418.

In the present case, the court below dismissed *Rice Milling* as inapplicable: "This was no case of a union's seeking 'to influence two employees of a customer of the mill not to cross the picket line.'" 278 F. 2d at 286. We submit, however, that the opinion as a whole, particularly in light of the citation of *Ryan,* makes clear that the decision turned

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"[2] See Matter of Oil Workers International Union, Local Union 346 (CIO) and The Pure Oil Company, 84 N.L.R.B. 315; Matter of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 201, AFL, and The International Rice Milling Co., Inc., et. al., 84 N.L.R.B. 360" (footnote by the Board.)

not on the number of secondary employees involved, but on the fact that they were induced merely to honor a picket line at the premises of the primary employer. Thus, in one of the companion cases to *Rice Milling,* the Court held that inducements directed to two employees of a secondary employer were unlawful. In that case, the employees were induced to refrain from working at a "common situs." *International B'hd of Elec. Workers* v. *NLRB,* 341 U.S. 694 (1951). This confirms our view that the controlling fact in Rice Milling was that the secondary employees were induced to refrain from working at the primary employer's premises, and not that the number of employees involved happened to be two.

The Board and the courts have consistently applied *Rice Milling* as we have interpreted it. Thus, in its 1953 Annual Report, the Board stated the rule to be as follows:

> "Ordinarily, a union's conduct is held to be secondary and prohibited if it occurs at the premises of a secondary employer and calls for action of employees of the secondary employer away from the primary dispute's actual site. On the other hand, picketing confined to the primary employer's premises is lawful even though it has the traditional objective to induce third persons from entering the premises for business reasons." Eighteenth Ann. Rep. of the NLRB 48 (1953). See also Sixteenth Ann. Rep. of the NLRB 226 (1951).

The courts have followed this principle. For example, in *DiGiorgio Fruit Corp.* v. *NLRB,* 191 F. 2d 642, 648-49 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 869 (1951), the District of Columbia Circuit affirmed the decision of the Board that it was not an unfair labor practice for the Teamsters Union, in conjunction with an organizing campaign at DiGiorgio, to picket the entrance to DiGiorgio's premises and to attempt to persuade truck

drivers employed by other employers not to pick up or deliver goods there. Some drivers who crossed the picket line were subject to internal union discipline by the Teamsters. The Court held that "such picketing activity is called a primary activity in the language of labor law" and is not prohibited by Section 8(b)(4)(A), which was intended to reach only "secondary" boycotts.

In *Local 618, Automotive Employees* v. *NLRB,* 249 F. 2d 332 (1957), the Eighth Circuit held that a union which was on strike against a chain of gasoline stations did not commit an unfair labor practice by picketing one of those stations, which had been temporarily shut down by the employer for remodeling, even though the plain purpose of the picketing was to induce the employees of the construction contractors, who were doing the remodeling, not to work at that place. The only difference between that case and the present case is that here a special gate to a single premises rather than one station in a chain of stations was designated by the employer as "off limits" to his own employees.

And in a very recent decision, the Seventh Circuit has reaffirmed the principle that it is not an unfair labor practice to attempt to induce employees of other employers not to enter the premises of the primary employer. *Milwaukee Plywood Co.* v. *NLRB,* 47 L.R.R.M 2291 (December 20, 1960). In that case, a union which had a primary dispute with an employer in Chicago picketed the premises of the employer's subsidiary in Milwaukee. After two days, the subsidiary's employees crossed the picket line, but employees of other employers, who came to the premises in the course of their employment, refused to cross. The employer charged that by inducing these employees of other employers to refrain from working the union had violated Section 8(b)(4). The Court, affirming the decision of the Board, held that this conduct "is no different in legal contemplation from the conventional situation where a

union sets up a picket line at the premises of an employer with whom it has a dispute." It relied chiefly upon Section 13 of the Act, the *Rice Milling* decision, and *DiGiorgio*. Referring to the language in the *Rice Milling* decision which distinguishes "individual" and "concerted" conduct, the court stated:

> "The phraseology used in describing primary picket line activities varies. Sometimes it is referred to as primary rather than a secondary activity; again, individual rather than concerted action, and at times the courts refer to the 'object' test. However, the courts seem to be in general agreement that Section 8(b)(4)(A) does not prohibit conduct on the picket line which is designed to secure observance of that line by employees of other employers who come to the picketed premises to make pickups or deliveries."

While the Seventh Circuit attempted to distinguish the decision in the present case on the ground that this case involves "a common work situs," we will show in a subsequent section of this brief that this distinction is wholly untenable.

It is noteworthy that the *Milwaukee Plywood* case was decided by the Board subsequent to its decision in the present case. It represents only one of several recent decisions in which the Board has continued to uphold the general right of a union to picket the premises of a primary employer in an effort to keep all persons—including employees of other employers—from entering.

In *International Organization of Masters, Mates & Pilots*, 125 N.L.R.B. No. 19, 45 L.R.R.M. 1059 (November 12, 1959), the Board held that appeals to secondary employees by way of telegram and talks at union meetings were not in violation of 8(b)(4), because "the inducement of other union members and of secondary employees invited their action of refusing to perform services only on the foreign

vessels, the situs of the primary dispute." The *Pure Oil* and *Interborough News* cases were specifically relied on. And in *International B'hd of Teamsters (Alexander Warehouse Co.)*, 128 N.L.R.B. No. 105, 46 L.R.R.M. 1409 (Aug. 25, 1960), the Board upheld the right of a union, which was engaged in a primary strike against a warehouse, to picket two other warehouses owned by the same employer, and to address oral appeals to the employees of other employers not to cross the picket line. Since the employees at the two warehouses were non-union, the object, and the effect, of the picketing was mainly to keep other employees away. Nevertheless, the Board correctly held that these appeals, "aimed as they were at inducing observance of a picket line at premises solely occupied by the primary employer, constituted a permissible form of primary activity." 46 L.R.R.M. at 1410.

The cases which we have reviewed, while certainly not an exhaustive list, should be sufficient to establish the general proposition that it has always been held to be within the area of legitimate primary activity for a union to induce employees of other employers not to enter the premises of a primary employer. As we have seen, such inducements have been upheld whether they be in the form of a picket line, oral appeals, letters, telephone calls, internal union discipline, speeches at union meetings—or any other form of communication. The Board, so far as we have been able to determine, does not attack that general proposition, but considers it inapplicable in the present case. We turn now, therefore, to the question of whether there is any basis in law or logic for treating this case differently than any other case of primary picketing.

II—THERE IS NO BASIS FOR DISTINGUISHING THIS CASE FROM ANY OTHER CASE OF PRIMARY PICKETING.

The long line of precedent which we have reviewed above was discussed at length in the Intermediate Report of the

Trial Examiner in the present case. (R. 23-29). It was his conclusion, on the basis of a thorough analysis of the cases, that the conduct of the union here was traditional primary picketing which is not prohibited by Section 8(b)(4)(A). The Board, without referring to a single one of the cases cited by the Examiner, stated simply: "We disagree." (R. 42). The ground for this "disagreement" is stated by the Board in only one cryptic sentence:

> "We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company." (R. 42).

The court below also completely ignored the precedents to which the Trial Examiner had referred, and held simply that "the Board reasonably could find, as it did find, that the Union by peaceful picketing to be sure, but effectively nonetheless, sought to encourage the employees of the independent contractors to engage in a concerted refusal to perform any services for their employers in the course of their employment and thus to force their employer to cease doing business with the Company." 278 F. 2d at 286.

This case thus comes to this Court without having had, at any previous stage, a detailed and reasoned articulation of the grounds for the decisions below. It is therefore necessary to examine two alternative rationales, neither of which are expressly set forth in the opinions below, but both of which are hinted at either in the present case or in similar cases decided subsequently by the Board.

A. *The Reserved Gate Rationale*

It was generally assumed, when the present decision was rendered, that the critical fact which in the minds of the Board and the court distinguished this case from all other cases was the presence of a "reserved gate" for employees of other employers. The opinions below placed great em-

phasis on that single fact, and subsequent cases demonstrate that employers, assuming that this was the controlling fact, began to establish "reserved gates" for the express purpose of taking advantage of the present decision. See *Local 36, International Chemical Workers,* 126 N.L.R.B. No. 117, 45 L.R.R.M. 1407 (Mar. 2, 1960); *United Steelworkers,* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (Apr. 2, 1960).

The notion that it would be permissible to induce employees of other employers to refuse to enter the premises of a primary employer through a gate used jointly with primary employees, but unlawful to induce them to refrain from entering the same premises through a gate reserved exclusively for them, is, to put it simply, nonsensical. Either it is or it is not unlawful to induce employees of other employers to refrain from working at struck premises; what possible difference can a separate gate make? Anyone who has attempted to explain this distinction to union members knows by their reaction how unreal and foreign any such notion is to the people actually involved in industrial relations.

More importantly, perhaps, this doctrine could in many situations destroy the effectiveness of a strike, and thereby emasculate the right to strike. Suppose, for example, that a manufacturer had sufficient capacity to produce a substantial inventory of his product prior to the strike. If, by the simple device of establishing a separate gate, he could continue to fill orders by having common carriers pick up goods at that gate without the interference of union pickets, the economic effect of the strike on the employer could be neutralized for an indefinite period. Similarly, suppose the nature of an employer's operation is such that it must be periodically closed down for repair or alteration. If the employees of contractors could be brought in to do that work, through a separate gate, the employer would benefit rather than suffer from the strike, at least for the period required to do the necessary work. While such flagrant ex-

amples may not occur often, there are undoubtedly numerous situations in which this technique could be used to lessen, if not completely eliminate, the economic pressure caused by a strike. It is precisely for that reason that it has always been considered not a secondary boycott but a normal part of a primary strike for a union to attempt, by peaceful persuasion, to prevent employees of other employers to refrain from working at struck premises.

Moreover, the "reserved gate" rationale raises very substantial constitutional difficulties. That aspect of Section 8(b)(4) which prohibits peaceful persuasion, by picketing or other means, was held by this Court to be constitutional because it prohibits only the inducement or encouragement of *unlawful* action. *International Bh'd of Elec. Workers* v. *NLRB*, 341 U.S. 694, 705 (1951). But the proviso to Section 8(b)(4) expressly protects the right of any employee to refuse "to enter upon the premises of any employer other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . ." Thus, to prohibit picketing at any gate to a primary employer's premises in support of a lawful primary strike is to prohibit a union to attempt, through peaceful free speech, to persuade other employees to exercise a right expressly conferred upon them by the Act. Even if it were assumed that the Act contemplated this anomalous result, the Constitution would prohibit it.

B. ***The Common Situs Rationale***

There is one situation in which, for many years, the Board and the courts have applied certain limitations on the right of a union to picket a primary employer. This situation involves what is called common situs picketing, and is best illustrated by the first case in which the rules governing such situations were promulgated. *Sailor's Un-*

ion of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950).

In *Moore Dry Dock*, the primary employer, the owner of a ship, was involved in a dispute with the union representing the sailors. The ship was being serviced at Moore Dry Dock, and there was no way to picket the ship without at the same time picketing the premises of Moore, an independent "secondary" employer. The Board held that "when a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute." 92 N.L.R.B. at 549. In order to balance these two conflicting "rights," the Board laid down four criteria to which picketing in such a situation must conform in order to be valid: (1) It must take place only at times when the *situs* of the dispute is located on the secondary employer's premises, (2) it must take place only when the primary employer is engaged in its normal business at the *situs*, (3) the picketing must be reasonably close to the location of the *situs*, (4) the picket signs must make clear that the dispute is with the primary employer.

The same restrictions have been applied in cases where the primary employer's business is trucking, and the picketing takes place at the premises of secondary employers where the trucks stop to make deliveries or pick up shipments, *e.g.*, *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (2d Cir. 1951), or where the primary employer is a construction contractor working at a construction site where other contractors are also working. *E.g. Brotherhood of Painters*, 110 N.L.R.B. 455 (1954). See also *Retail Fruit Union* v. *NLRB*, 249 F. 2d 591 (9th Cir. 1957), in which the common situs doctrine was applied to picketing of a market housing several independent retail stands.

Neither the opinion of the Board nor the opinion of the Court of Appeals in the present case appear to be based

on the common situs doctrine. Indeed, Member Fanning concurred specially, urging that that doctrine is what the Board should have applied. In a subsequent case, however, involving essentially the same facts presented here, the Board adopted the opinion of a Trial Examiner which relied heavily on common situs precedents. *United Steelworkers,* 126 N.L.R.B. No. 168, 45 L.R.R.M. 1474 (April 2, 1960).

It is, to say the least, unfortunate that we must write our brief before ascertaining precisely on what grounds the Board will defend the present decision. Since the Board may rely on the common situs doctrine, we feel compelled to deal with that issue in our brief, although it does not appear that this was the basis of either decision below and reliance upon it in this Court would, therefore, be wholly improper. *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87-95 (1943).

The common situs rules were never intended to prevent a striking union from inducing employees of other employers to refrain from doing work which benefits the primary employer at the primary employer's premises. Rather, they were intended to implement the policy of the act against the spreading of labor disputes by preventing a union's picket line at a common situs from inducing employees of other employers to refrain from work which does not affect the primary employer, but which happens to be performed at the common situs.

If a striking union could picket a construction project or other common situs without any limitation, the result would often be a complete stoppage of work by all union workers at that site. See *NLRB* v. *Denver Bldg. Trades Council,* 341 U.S. 675 (1951). The *Moore Dry Dock* rules, on the other hand, tend to limit the picketing in such a way that its effect is approximately the same as it would be at a single employer's premises.

A good example is the case cited by the Board in its de-

cision here, *Atomic Projects and Production Workers (Associated General Contractors)*, 120 N.L.R.B. 400 (1958), *enf'd per curiam*, 262 F. 2d 931 (D.C. Cir. 1959). There the primary employer was Sandia Corporation, which operated a steam plant on an Atomic Energy Base. A number of construction contractors were working on several construction projects on the Base. None of the contractors were performing any work for or had any relationship with the primary employer; they simply happened to be located on the same physical premises. When the Base authorities were informed that there was a labor dispute with Sandia, they set aside a separate gate for the contractors and their suppliers. The union representing Sandia's employees picketed that gate, and the Board found that the picketing was an unfair labor practice. Since adequate precautions were taken by the Base to assure that only the contractors and their suppliers were permitted to use the special gate, it is plain that the picketing of that gate was not the equivalent of picketing the premises of the primary employer. The effect of the picketing was not to keep third persons away from the premises of the primary employer, but rather to induce employees of other employers to refuse to perform work which had no connection with the primary employer at all. This is, of course, quite different from picketing a separate gate to the premises of the primary employer, and inducing employees of other employers to refrain from working only at the premises of the primary employer.

While the term "common situs" may be somewhat ambiguous, it is perfectly clear from the cases that it does not refer to every situation in which employees of more than one employer happen to perform work, in the course of their employment, at a single place of business. If that were so, every industrial plant, every warehouse, every store would be a "common situs," since all such establishments are regularly visited by common carriers, employees

of customers or suppliers, painters, carpenters, plumbers, and innumerable other "secondary" employees. Thus if *Moore Dry Dock* were read as applying to every case in which the employees of more than one employer are present at the site of a labor dispute, the effect would be to impose the *Moore Dry Dock* requirements on all primary picketing.

The *Moore* opinion itself makes it perfectly clear that no such result was intended. Indeed, that opinion opens with a reaffirmation of the principle that "picketing at the premises of a primary employer is traditionally recognized as primary action even though it is 'necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.' " The opinion cited with approval the reasoning and the result in the *Ryan* case, which, as we have seen, directly supports our position in the case at bar. It then went on to distinguish the typical primary picketing situation from the situation presented in that case in the following way:

> [I]f Samsock, the owner of the *S. S. Phopho,* had had a dock of its own in California to which the *Phopho* had been tied up while undergoing conversion by Moore Dry Dock employees, picketing by the Respondent at the dock site would unquestionably have constituted *primary* action, even though the Respondent might have expected that the picketing would be more effective in persuading Moore employees not to work on the ship than to persuade the seamen aboard the *Phopho* to quit the vessel. The difficulty in the present case arises, therefore, not because of any difference in the picketing objectives, but from the fact that the *Phopho* was not tied up at its own dock, but at that of Moore, while the picketing was going on in front of the Moore premises." 92 N.L.R.B. at 548-49.

Thus the opinion in *Moore* makes it perfectly clear that it was not intended to reverse or affect in any way the prin-

ciple that a union may, by picketing or otherwise, induce secondary employees to refrain from working *at the premises of a primary employer.*

The present case would be analogous to *Moore Dry Dock* if it had been the employees of the contractors, rather than the employees of General Electric, who had been on strike. In that situation the effect of *Moore* would be to prohibit the contractors' employees from picketing the entire plant and thereby inducing a strike by the employees of General Electric. Significantly, the "contractor's gate" was originally established in order to provide a place where contractors' employees could picket without reaching General Electric employees (R. 39), and the present decision is the first one to suggest that Section 8(b)(4) could also be applied to prevent GE employees from picketing a gate to their own employer's premises merely because that gate is exclusively reserved to other employees.

The distinction between these two situations is fundamental. It is the difference between picketing one's own employer, thereby inducing third persons from entering his premises, and picketing a "neutral" employer, thereby inducing work stoppages at a point away from the site of the primary dispute.

> [I]t is clear . . . that Congress did not intend to forbid picketing at a primary employer's premises, the situs of a dispute. Section 8(b)(4) must be interpreted and not merely read literally. No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of Section 8(b)

(4). *Seafarers Int'l Union* v. *NLRB,* 265 F. 2d 585, 591 (D.C. Cir. 1959).

If the basis for the decision here is in fact the common situs doctrine, then it follows that the same result would have been reached even if there had been no reserved gate. Indeed, in a recent decision, rendered subsequent to the present one, the Board, applying the *Moore Dry Dock* criteria, held that picketing at the only entrance to the primary employer's plant was an unfair labor practice, since it induced employees of other employers not to enter the premises. The primary employer's plant was a common situs, the Board held, because the secondary employer, a construction contractor, was "engaged in work for a relatively extended period of time at the premises" of the primary employer. *Union De Trabajadores, (Gonzales Chemical Industries, Inc.),* 128 N.L.R.B. No. 116, 46 L.R.R.M. 1423 (August 26, 1960). Member Fanning, who advocated application of the *Moore Dry Dock* rules in the present case, apparently realized the implications of that position and dissented in *Gonzales.* He there pointed out that "the rule here annunciated by the majority renders virtually all primary picketing subject to the *restricting* aspects of *Moore Dry Dock,* contrary to statutory and decisional law insuring the right of employees to engage in the traditional primary strike."

Perhaps the most eloquent attack on this extension of the *Moore Dry Dock* principle to the typical picket line at the single employer's place of business was voiced by the Trial Examiner in *Gonzales,* whom the Board reversed. In rejecting the contentions of the General Counsel in that case, the Examiner wrote as follows:

> "Implicit if not explicit in the General Counsel's argument is the prediction that the Board will rule that primary picketing and oral appeals must be restricted, even at the primary situs, to employees of the struck

employer. The effect of such a holding on the right to picket, the right to publicize disputes and the right to ask for traditional observance of the picket line by other unions and their individual members and by the employees of other employers will be more than substantial. It will emasculate, to a significant extent, the vigor of the picket line. It may well be, as Mr. Justice Douglas said of the Supreme Court in the *Vogt* case, that the Board is about to make the full cycle and that settlement of strikes by injunction will again prevail, the Norris-LaGuardia Act notwithstanding. If the General Counsel is correct in his contentions herein then all picketing may be enjoined which is not addressed and confined solely to the employees of the struck employer. In such case the primary duty of the pickets may be to provide an escort service for the employees of other employers, since anything which falls short of open invitation to enter the struck premises could well be construed as an appeal not to enter. Perhaps a political climate has been reached where the right of employees to strike is subjugated to the privilege of the employer to be free from inconvenience resulting from labor disputes. If so, the rights of employees are clearly in peril and those labor organizations which seek to represent them at the bargaining table may have no weapon stronger than supplication and no ultimate recourse but surrender."

We urge this Court to rescue the right to strike from the inroads which the Board has made on it in this case and related cases. What is involved here is simple, primary picketing of the kind which the act specifically protects. This is not a secondary boycott. Neither is it "common situs" picketing. It is picketing at the premises of the primary employer, and employees of other employers are affected only in that they are induced not to work at the premises of a struck employer. The validity of such picket-

ing and such inducements must be reaffirmed if the rights of workers guaranteed in Section 7 and Section 13 are to be preserved.

III. THE RECENT AMENDMENTS TO SECTION 8(b)(4) MAKE IT CLEAR THAT THE PICKETING IN THIS CASE WAS NOT AN UNFAIR LABOR PRACTICE UNDER THE OLD LAW AND WOULD NOT BE ONE UNDER THE AMENDED ACT.

As we have previously pointed out, the picketing which is the subject of this case took place prior to the recent amendments to the Taft-Hartley Act. If, as we have contended, that picketing was not unlawful under the old Act, the Board's decision would have to be reversed regardless what the effect of the new amendments might be on such picketing. Congress specifically provided that its amendments to Taft-Hartley would not become effective until 60 days after the date of enactment (September 14, 1960), and that:

> "No provision of this Title shall be deemed to make an unfair labor practice any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto." P. L. 86-257, §707, 73 Stat. 546.

Nevertheless, the new amendments are relevant to this case. As often happens, the new version helps to clarify the old. In addition, if this Court should hold, contrary to our contentions above, that the Board's decision was correct under the old law, then the Court would have to determine whether such conduct would be illegal under the new law. Since the Board's cease and desist order operates prospectively, it cannot be enforced unless picketing of the kind involved here would be an unfair labor practice not only under the old law but also under the new law. See, *e.g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855).

The pertinent portion of the statute as amended makes it an unfair labor practice for a labor organization:

> "to engage in, or to induce or encourage *any individual employed by any person* . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is:
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> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: Provided, *That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary Picketing;*" 29 U.S.C. §158(b)(4)(B) (Supp. I, 1959) (Emphasis added.)

The only changes which are significant for the purposes of this case are indicated above in italics. The first of these makes it unlawful to induce or encourage *any individual* employed by any person to engage in a strike or other refusal to work where the object is one of those proscribed by the section. Under the prior law, it was only unlawful to induce employees to engage in "concerted" refusals to work. The second change is the addition of the proviso at the end of subparagraph (B) which specifically protects "primary strikes" and "primary picketing."

These two changes are obviously not unrelated. As we have seen, the original statute could have been interpreted as prohibiting all picketing, if the language were read strictly and without reference to its underlying purpose. Recognizing that this was not the intention of the Congress, the Board and the federal courts had held, in the line of cases

to which we have referred, that primary picketing was not prohibited even though it almost always induces employees of other employers to refrain from crossing the picket line. This view was approved by the Supreme Court in *Rice Milling*. In that case, however, the Court, rather than relying on the primary-secondary distinction, used the word "concerted" as the basis for its decision, and held that primary picketing is not unlawful because "a union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees." 341 U.S. at 671.

When the new legislation was being considered by the Conference Committee, the Senate Conferees felt that the deletion of the word "concerted" from the statute might cast doubt on the validity of traditional, primary picketing. To avoid that result, a proviso specifically protecting primary picketing and primary strikes was inserted by the Conference Committee. In the words of the Conference Report, "The purpose of this provision is to make it clear that the changes in section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. The provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law [Citing *Moore Dry Dock* and other common situs cases]." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959).

Thus the Conference Report makes clear that the purpose of the proviso was to preserve the right to engage in primary picketing and primary strikes as defined by the established precedents at the time the new amendments were passed. At that time, as we have seen, it was well established by countless decisions of the Board and the courts that that right included the right to induce employees of other employers, by picketing, by mail, by telegram, or by

any other means, to refuse to enter upon the premises of an employer with whom the union had a legitimate primary dispute.

It is true that the present case was decided by the Board shortly before the new Act was passed, but it was still pending in the Court of Appeals at that time, and there is no evidence in the legislative history that anyone on Capitol Hill was aware of that decision. All the other "contractors' gate" cases were decided only after the new Act was passed. On the other hand, such Board decisions as *Pure Oil, Interborough News,* and *Ryan,* such court of appeals decisions as *Local 618* and *DiGiorgio Fruit Co.,* and this Court's decision in *Rice Milling* were well-known, and when the Congress referred to "primary strikes and primary picketing" it can only have meant to refer to the rules established in those cases.

That Congress understood the "existing law" to be as we have described it is made clear by the explicit discussion of Section 8(b)(4) in the House Report, H.R. Rep. No. 741, 86th Cong., 1st Sess. 779 (1959):

> " 'Primary activities' is a term used to describe a strike or picketing at a plant of the employer engaged in a labor dispute. It is settled law that the National Labor Relations Act does not require a truck driver to cross a primary picket line and that the 'pickets may request him not to enter the strike-bound plant.' (See *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665.) The truck driver's employer would have the legal right to discharge him, or the employer could agree that he would not require the driver to enter the strike-bound plant. These activities are all different from the earlier example [of concerted activity away from the employers' premises] because they are limited to the scene of the labor dispute."

Congress understood also that the special rules govern-

ing common situs situations were not applicable to the ordinary industrial picket line.

> "It is settled law that the employees of a mine or mill owner or in a factory may peacefully picket their place of employment in seeking higher wages, shorter hours, better conditions of employment, or other lawful objectives. So long as their placards are honest, *the pickets do not have to choose their words with an eye to the legal consequences.* They may ask others not to cross the picket lines." id. at 780 (emphasis added.)

It is plain, therefore, that when Congress attached to the amended Section 8(b)(4) a proviso protecting "primary picketing" it intended to protect precisely the kind of conduct involved here: the inducement of employees of other employers not to cross a picket line at the site of a primary dispute.

Indeed, the Conference Report specifically referred to *Moore Dry Dock* as being one of the decisions which it intended to preserve. As we have seen, that case not only laid down restrictions on picketing in common situs situations, but also carefully preserved the right to picket freely at the premises of the primary employer, and specifically reaffirmed the decision of the Board in *Ryan* and other cases in which inducing secondary employees not to work at the site of a primary dispute was held to be lawful.

The fact that the primary picketing proviso was intended to protect such inducements becomes even more clear when that proviso is compared with other provisos which were inserted into the amended act, and which protect picketing or similar conduct in other circumstances.

One of these appears at the end of 8(b)(4), and protects a union's right to publicize the fact that one or more employers are handling or selling products of another employer with whom there is a labor dispute. That pro-

viso specifically provides, however, that the right to publicize that fact exists only "as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." In this proviso, therefore, Congress specifically protected certain conduct only so long as it does not induce work stoppages by secondary employees at the premises of a secondary employer.

A similar proviso was inserted in Section 8(b)(7), 29 U.S.C. §158(b)(7) (Supp. I, 1959), which deals with "organizational" or "recognitional" picketing. That proviso protects picketing for the purpose of informing the public that an employer does not employ members of, or does not have an agreement with a union, "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services." Again, certain conduct is permitted only as long as it does not induce work stoppages by secondary employees.

It follows that if the primary-picketing proviso had not been intended to protect a union's right to induce employees of other employers not to enter the picketed premises, then Congress would have specifically said so, as it did in these other provisos which deal with picketing and similar conduct in other circumstances. By not putting in the primary picketing proviso qualifying language similar to that in other provisos, Congress manifested its intention to protect primary picketing even though it induces employees of other employers not to cross the picket line.

It is noteworthy also that the proviso in 8(b)(4) which protects publicity directed at consumers ceases to operate only if work stoppages are induced at the premises of *secondary* employers. This reaffirms the fact that inducing

employees of other employers not to enter the premises of a primary employer is not a violation of 8(b)(4).

Our interpretation of the new Act has been confirmed by a man who played a key role in the drafting of that legislation. Professor Archibald Cox of Harvard Law School, a well-known authority in labor law, worked with the Senate sponsors of the legislation from its inception through the final Conference. In a discussion of the Landrum-Griffin amendments to Taft-Hartley he has explained the purpose of the primary picketing proviso as follows:

> "[T]he NLRB and court decisions under the Taft-Hartley Act held that . . . turning people away from the scene of a labor dispute is an incident of a primary strike rather than a secondary boycott. The Supreme Court adopted this interpretation in the *Rice Milling* case, but the opinion stressed the point that Section 8(b)(4)(A) prohibiting inducements to engage in 'a concerted refusal.' Since the Landrum-Griffin bill deleted this phrase, it might have overturned the entire line of decisions if a majority of the Senate Conferees had not secured the inclusion of explicit language safeguarding the right to engage in primary picketing even though truck drivers are stopped by the pickets."

Professor Cox concludes, therefore, that "under the *Rice Milling* case and the new confirmatory proviso, as explained above, it is not an unlawful secondary boycott to induce employees to refuse to cross a primary picket line where the refusal causes the secondary employer to cease doing business with the primary employer *at the site of the labor dispute*." Cox, Law and the National Labor Policy 32, 34 (1960). (Emphasis in original.)

We do not think that Congress intended to make the new Act less restrictive than the old. Rather, Congress wanted to preserve the right—which, until very recently, everyone

assumed existed under the old Act—to induce employees of other employers to refrain from entering the premises of an employer with whom a union had a primary dispute. The Board has now said that all the prior decisions were wrong, and that no such right existed under the old Act. Meanwhile, however, Congress has passed new legislation specifically designed to preserve precisely that right which the Board has now so sharply restricted. Only two conclusions are possible. Either the Board erred in this case and the other recent cases in which the Board has reached a similar result, or Congress in amending Section 8(b)(4) has created a right which did not previously exist under the old law, all cases to the contrary notwithstanding. We submit that the former conclusion is the correct one. In either case, however, the Board's order cannot now be enforced, and its decision must be reversed.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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